No. SC92594

IN THE MISSOURI SUPREME COURT

JANET CHOCHOROWSKI, individually and as the Representative of a class of similarly-situated persons,

Plaintiff-Appellant,

v.

HOME DEPOT U.S.A., D/B/A THE HOME DEPOT,

Defendant-Respondent.

On Transfer from the Missouri Court of Appeals Eastern District, No. ED97339, there on appeal from the Twenty-First Judicial Circuit, St. Louis County, Missouri
Circuit Court No. 08SL-CC01183-01

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

Like her Application for Transfer, Plaintiff's Substitute Brief ("Substitute Brief" or "Sub. Br.") is riddled with inaccuracies, exaggerations, and outright mischaracterizations of the record evidence in this case. Set forth below is an accurate recitation of the facts before the Trial Court on Home Depot U.S.A., Inc. ("Home Depot")'s motion for summary judgment. In addition, Home Depot has prepared a catalogue of the more significant inaccurate factual statements contained in the Substitute Brief and identifies the record evidence proving these contentions incorrect, in Respondent's Appendix at A1-A9.

I. HOME DEPOT'S POLICIES AND PROCEDURES REGARDING THE DAMAGE WAIVER

Home Depot offers a wide variety of tools for rent at tool rental centers located throughout Missouri. *See* LF 502. Through this service, Home Depot allows customers access to tools that are expensive to purchase, and cost efficient to rent. *Id.* In connection with each tool rental, Home Depot offers customers the opportunity to purchase a variety of related products and services, including a damage waiver. LF 502. The damage waiver relieves customers of liability in the event that a rented tool is accidentally damaged during normal use. LF 503. For example, if a rented garden tiller hits a rock and breaks a tine and that customer had declined the damage waiver, the customer would be required to pay the repair cost of approximately $150.00. *Id.* If the

customer purchased the damage waiver (at a cost of approximately $6.50), the customer would not have to pay this repair cost. *Id.*

Home Depot has offered the damage waiver for as long as it has offered tools for rent. LF 503. And it has always been optional. LF 503. Indeed, by definition the entire transaction between Plaintiff and Home Depot was optional; that is, Plaintiff's tool rental and purchase of the damage waiver resulted from Home Depot's offer and her acceptance, evidenced in a written contract. If Plaintiff did not agree to any of the terms of Home Depot's offer, including the offer of the damage waiver, she could simply have refused to accept the proposed terms of this contract by not signing it. Similarly, if Plaintiff did not want to purchase the damage waiver, she could have rejected Home Depot's offer of that service and refused to initial the section of the agreement where she accepted the damage waiver. She could not have been charged for the damage waiver until she accepted it in writing. Or she could have simply struck through the damage waiver election as she did elsewhere in the contract to correct her address. Finally, she could have just requested that Home Depot print another version of the contract reflecting her decision to decline the damage waiver.

Beyond these obvious fundamental basics of contract formation, Home Depot has gone to great lengths to disclose to customers that the damage waiver is optional. Home Depot discloses the optional nature of the damage waiver in at least three ways: (1) in the oral discussions that tool rental associates have with customers; (2) in the written rental agreement offered to Home Depot customers; and (3) in signs displayed throughout Home Depot's tool rental centers. LF 503.

Home Depot's tool rental associates have always been responsible for making the oral disclosures. *Id.*; LF 641; LF 690; LF 721. Pursuant to Home Depot's written policy, tool rental associates ensure that customers are informed of the optional nature of the damage waiver through their discussions with customers. LF 503; LF 641; LF 690; LF 721. To this end, Home Depot trains its associates to (1) describe to customers the optional nature of the damage waiver; (2) ask whether the customer would like to purchase that service; and (3) confirm the customer's election to either purchase or decline the damage waiver by initialing next to that election and then signing the rental agreement. *See* LF 503; LF 641; LF 690; LF 721.

These oral disclosures are a significant method by which Home Depot ensures that its customers understood the optional nature of the damage waiver, but they are not the only means of disclosure. Rather, these oral disclosures are supplemented by the written terms of each customer's rental agreement. While the form and terms of the written rental agreement have changed over time, in this case, Plaintiff challenges only the earliest version of the rental agreement. (*See* Attachment B (Plaintiff's rental agreement), contained in Respondent's Appendix). As the Court of Appeals concluded here, the rental agreement used during the relevant period of time discloses the optional nature of the damage waiver. *See* Slip. op. at 7 ("[T]he Rental Agreement itself unambiguously discloses the optional nature of the Damage Waiver.").

The first page of the rental agreement discloses the damage waiver as optional in unmistakable language. LF 28. For example, when customers elect to purchase the damage waiver, the contract, in a text box that the customer was asked to initial, provided

as follows: "I ACCEPT THE BENEFITS OF THE DAMAGE WAIVER (IF APPLICABLE) DESCRIBED IN PARAGRAPH 11 IN THE TERMS AND CONDITIONS OF THIS RENTAL AGREEMENT." *Id*. Thus, Home Depot customers who initialed this section of the contract, like Ms. Chochorowski, expressly agreed that they "ACCEPT[ED]" the damage waiver; that they knew their acceptance was only "IF APPLICABLE" (i.e., they had not informed Home Depot that they wished to decline the damage waiver); and that they agreed to purchase the damage waiver. *Id*. Clearly, a customer who "accepts" a charge was given a choice to decline it. Moreover, if a customer declined the Damage Waiver, a different proposed contract was generated, which expressly stated that the customer "DECLINED THE BENEFITS" of the damage waiver.[1] *See* LF 505. Customers memorialized their choice regarding the damage waiver by initialing the rental agreement, expressly indicating that they "HAVE READ AND AGREE, AS INITIALED TO THE RIGHT, TO THESE SPECIAL TERMS AND CONDITIONS," and then, by signing the agreement, acknowledged that they "agree[d] to the terms and conditions printed on this page and on the other pages of the agreement." LF 505.

[1] Plaintiff also wrongly argues that the "operating manuals could not be declined." (Sub. Br. at 7). In truth, like the decision to accept or reject the damage waiver, the customer's choice to accept *or decline* the operating manuals for the tool is reflected in the special terms and conditions of the rental agreement. *See* LF 288.

The rental agreement also described the optional nature of the damage waiver in the Terms and Conditions page: "***If I pay*** the damage waiver charge for any Equipment, this agreement shall be modified to relieve me of liability for accidental damage to it . . . ." LF 505 (emphasis added). Based on this conditional contract language, the Court of Appeals correctly found that Home Depot discloses the damage waiver to be an optional service that customers can accept or decline. Slip. op. at 7-8 (finding that Rental Agreement disclosed the optional nature of the damage waiver).

In addition to its oral and contract disclosures, Home Depot displays signs that further inform customers that the damage waiver is optional. *See* LF 506. The signs expressly describe the damage waiver as an optional service. *See* LF 506. According to Home Depot's policy, these signs must be posted in at least two locations in each tool rental center. *See* LF 506.[2]

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[2] Home Depot's efforts to inform customers that the Damage Waiver is optional have been successful. While the number of customers that elect to purchase the damage waiver varies from store to store and over time, through fiscal year 2005, customers in over 40,000 transactions in Missouri elected to decline the optional damage waiver. *See* LF 616-617. Given the number of transactions without a damage waiver, it is remarkable that Plaintiff persists in falsely claiming the damage waiver is "automatically added" to every rental. Sub. Br., p. 5. The evidence shows that, per Home Depot's policy, the damage waiver is only added to an agreement after the customer agrees to purchase it.

II. PLAINTIFF'S TOOL RENTAL

On April 27, 2002, Plaintiff, an Illinois resident, rented a garden tiller from a Home Depot in Brentwood, Missouri. *See* LF 9, 11. Before she agreed to rent the tool, Home Depot presented Plaintiff with a draft rental agreement that described the proposed terms of her rental. LF 11. As reflected in the contract, Home Depot offered to sell Plaintiff a damage waiver for $2.50, an amount that is disclosed separately from both the tool rental charge and the applicable taxes. LF 28.

Contrary to Plaintiff's suggestion to this Court, the damage waiver was not automatically added to Plaintiff's contract without her knowledge. Sub. Br, p. 6. There were ***no*** add-ons to the Plaintiff's contract at all; no products or services that Home Depot attempted to sneak past Plaintiff after she had agreed to the contract terms. LF 28-31. Rather, Home Depot proposed certain contract terms to Plaintiff, including the offer of the damage waiver, and Plaintiff accepted that offer, as evidenced by her signature and initial on the rental agreement. LF 28. Plaintiff did not have to take an affirmative step to reject these terms. To the contrary, there was no contract at all until Plaintiff took the affirmative step necessary to accept all of these terms by signing the agreement. LF 28.

The rental agreement Plaintiff signed identified the damage waiver as optional. The "Special Terms and Conditions" section of Plaintiff's rental agreement highlights certain provisions of the agreement, specifically referring Plaintiff to the particular paragraph of the agreement that explains the damage waiver and requires Plaintiff to confirm her decision to purchase it. *Id.* Plaintiff initialed this box, expressly acknowledging that "I HAVE READ AND AGREE, AS INITIALED TO THE RIGHT,

TO THESE SPECIAL TERMS AND CONDITIONS." *Id.* Plaintiff also signed the agreement, acknowledging that "I agree to the terms and conditions printed on this page and on the other page(s) of this agreement." *Id.* Thus, Plaintiff agreed in writing to purchase the optional damage waiver for a charge of $2.50.

Despite making handwritten revisions to the rental agreement before signing it, Plaintiff has claimed that she did not review the entire document until after she left Home Depot. Sub. Br., p. 4. She also claims that she had no discussions with any Home Depot representative concerning the damage waiver before she rented the tool, despite Home Depot's policy requiring such disclosures, and that she did not see any signs in Home Depot's tool rental center describing the damage waiver as optional. *Id.*, pp. 3-4. Nevertheless, Plaintiff concedes the following essential facts: (1) that no one at Home Depot prevented her from reading the contract (LF 627); (2) that by signing the rental agreement, Plaintiff accepted the damage waiver (LF 633); (3) that once Plaintiff read the contract, on her drive home from the Home Depot store, she understood the relevant terms (LF 630-31); and (4) that the damage waiver charge was designed to protect Plaintiff from liability for damage to the tool sustained during her rental (LF 637). In other words, even Plaintiff concedes that if she had bothered to read the contract before she signed it, she would have understood the terms of the damage waiver Home Depot offered her.

After Plaintiff took possession of the tool, she used it and later returned it without having damaged it. LF 634. At that time, Home Depot provided Plaintiff a rental invoice, much like a receipt, which separately listed the tool rental charges and the

damage waiver fee. *Id.* Plaintiff claims that she then asked a Home Depot associate about the damage waiver and was informed that Home Depot "charge[s] everybody" for it. LF 630.[3] Plaintiff did not ask that the charge be removed; she did not ask for a refund; and she did not inform anyone at Home Depot -- then or at any other time -- that she did not want the damage waiver. LF 636.[4] Instead, Plaintiff paid the rental charges, including the separately listed damage waiver fee.

III. THE TERMS AND CONDITIONS OF PLAINTIFF'S TOOL RENTAL

Even though Plaintiff claims she did not read them until after she took possession of her tool, the terms and conditions page of Plaintiff's rental agreement describes the

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[3] As discussed in footnote 2, this statement is incorrect because tens of thousands of Home Depot customers have declined the damage waiver.

[4] Plaintiff contends that she informed Home Depot she did not want the damage waiver. Sub. Br., p. 4. There is no support for this contention. Rather, throughout her deposition, Plaintiff repeatedly admitted that she never told anyone at Home Depot that she did not want the damage waiver, whether before, during, or even immediately after her tool rental. LF 636. Indeed, Plaintiff's testimony was not that she told Home Depot that she didn't want the damage waiver, but instead, she essentially testified that it turned out she didn't *need* the damage waiver because she didn't damage the tool. *See* LF 484 (Plaintiff testified that that "I didn't break [the tool]"), 492 ("I didn't damage [the tool]"). Whether Plaintiff subsequently damaged the tool has no bearing on her acceptance of the damage waiver when she signed the rental agreement.

terms under which Plaintiff agreed to rent the tool and purchase the damage waiver from Home Depot. LF 28. According to these terms, if Plaintiff declined to purchase the damage waiver, she would have accepted all risk that her rented tool would be damaged while in her possession:

> I agree that, upon execution of this agreement, **I assume all risks of loss, theft, damage or destruction, partial or complete, of the Equipment from any and every cause whatsoever**.

LF 29 (emphasis added). Absent the damage waiver, therefore, Plaintiff assumed all risk of loss for any damage to the rented tool.

Because she agreed to purchase it, the damage waiver modified this contract term and relieved Plaintiff of risk regarding any accidental damage to the tool. In Paragraph 11 of the rental agreement -- a paragraph titled "Damage Waiver" -- Plaintiff's rental agreement provides as follows:

> If I pay the damage waiver charge for any Equipment, this agreement shall be modified to relieve me of liability for accidental damage to it, but not for any losses or damages due to theft, burglary, misuse or abuse, theft by conversion, intentional damage, disappearance or any loss due to my failure to care properly for such Equipment in a prudent manner ... .

LF 29.

This provision, like the first page of Plaintiff's rental agreement, plainly demonstrates that Plaintiff had an option to purchase the damage waiver. *Id.* ("If I pay the damage waiver charge . . . ."). In addition, this section of the agreement describes the

protection from liability provided by the damage waiver. Because Plaintiff chose to purchase the damage waiver, she was "relieve[d] of liability for accidental damage" to the rented tool. *Id.* No other provision in the rental agreement modifies the risk allocation contained in Paragraphs 3 and 11. As the language of Paragraph 11 makes clear, the protection provided by the damage waiver is significant and valuable. Slip. op. at 9 ("The Damage Waiver has value because it modifies the broad allocation of risk to [the rental customer] by relieving [her] from liability for accidental damage to the tool, both when the tool is being used properly and when the tool is not being used at all.") (citations and internal quotations omitted). In fact, Home Depot's expenses in repairing and replacing tools pursuant to the damage waiver are far greater than the revenue generated by damage waiver sales. LF 916.

IV. PROCEDURAL HISTORY OF THIS MATTER

Plaintiff filed her complaint in St. Louis County on March 20, 2008.[5] In that complaint, Plaintiff asserts two claims for relief under the Missouri Merchandising Practices Act ("MPA"). Plaintiff claims that Home Depot failed to disclose that the

[5] Plaintiff's filing in Missouri followed her initial filing of this suit against Home Depot in 2002 in Madison County, Illinois. After proceeding in Madison County, and on appeal, for five years, the Illinois Court of Appeals dismissed the Plaintiff's case because Plaintiff's transaction with Home Depot took place in Missouri. *See Chochorowski v. Home Depot U.S.A., Inc.*, 875 N.E.2d 682 (Ill. Ct. App. 2007). Plaintiff then filed this action in the Trial Court. LF 1.

damage waiver is an optional service and that the damage waiver is worthless. LF 17, 19. On February 26, 2009, after briefing and oral argument, the Trial Court granted Home Depot's motion to dismiss Plaintiff's complaint for failure to state a claim. Without considering the substance of the rental agreement or the underlying merits of Plaintiff's claims, the Missouri Court of Appeals, Eastern District, overturned the February 26 Order on September 22, 2009, holding that dismissal of Plaintiff's claims on the merits, as the Court's February 26 Order contemplated, was inappropriate on Home Depot's motion to dismiss. *Chochorowski v. Home Depot U.S.A., Inc.*, 295 S.W.3d 194, 198 (Mo. App. E.D. 2009) ("A court may not grant a motion to dismiss for failure to state a claim based on a conclusion that the plaintiff is not entitled to relief on the merits of that claim."); *see also id.* at 199 ("Whether or not plaintiff can meet her burden of proof on this issue is also a question to be determined by summary judgment or by trial, not by a motion to dismiss."). Upon remand, the parties then proceeded to discovery.

During discovery, Home Depot responded to written discovery, produced documents responsive to Plaintiff's requests, and made available a corporate representative to testify regarding the allegations in this case. On June 7, 2011, following this discovery, Home Depot filed a motion for summary judgment showing that Plaintiff's claims ran contrary to the clear terms of Plaintiff's rental agreement and, as a result, fail as a matter of law. LF 353-381. On August 2, 2011, the Trial Court granted Home Depot's motion and entered a final judgment in Home Depot's favor on October 21, 2011. LF 694; LF 978.

Plaintiff appealed the trial court's order to the Missouri Court of Appeals, Eastern District. LF 965-970. After full briefing and oral argument, the Court of Appeals affirmed the Trial Court's Order in an opinion issued on April 10, 2012. Rejecting the same points relied on that Plaintiff has presented to this Court, the Court of Appeals held that "[t]he Rental Agreement at issue, which Appellant voluntarily signed, discloses the optional nature of the Damage Waiver." Slip op. at 8. "Furthermore," according to the Court of Appeals, "the Damage Waiver is not a negative option because Appellant had a chance to read and review the Rental Agreement prior to signing it, and did not have to initial her consent to the optional Damage Waiver." *Id.* The Court of Appeals similarly rejected Plaintiff's contention that the damage waiver was worthless: "[T]he clear terms of the Rental Agreement belie this blanket claim about the value of the Damage Waiver. The Rental Agreement describes the Damage Waiver and makes clear that it protects Appellant from liability for damage to the garden tiller if the garden tiller is damaged while she is using it for normal purposes during her rental." *Id.* at 8-9.

The Court of Appeals later rejected Plaintiff's request to transfer this case to this Court. Following that court's denial of Plaintiff's transfer request, Plaintiff asked this Court to accept this case. Plaintiff's transfer application, a ten-page document submitted to this Court on June 6, 2012, does not contain a single citation to record evidence. On examination, the purported "facts" as identified in Plaintiff's transfer application are not the actual facts as developed in discovery in this case, and they do not form a basis for impugning either the Trial Court's or the Court of Appeals' decision. The record evidence in this case, as described above, contradicts virtually every significant point

Plaintiff described in her transfer application. *See* Attachment A to Respondent's Exhibit.

On August 14, 2012, this Court accepted Plaintiff's transfer application. Plaintiff then submitted a substitute brief. Except for a few references to the Court of Appeals' opinion, Plaintiff's substitute brief to this Court is essentially identical to the brief Plaintiff submitted to the Court of Appeals. Just like the Court of Appeals did in rejecting Plaintiff's arguments, this Court should affirm the Trial Court's Order.

ARGUMENT AND CITATION OF AUTHORITIES

I. SUMMARY OF THE ARGUMENT

In this appeal, Plaintiff attempts to avoid the express language of the contract she signed and asks this Court to ignore well-settled, fundamental principles of contract law. Plaintiff's tool rental transaction followed a pattern like many other consumer transactions across the State of Missouri every day. After greeting Plaintiff and learning what brought her to Home Depot that day, Home Depot recommended certain products and services to Plaintiff. Specifically, Home Depot offered Plaintiff the opportunity to rent a garden tiller and to purchase a related damage waiver, a service that would relieve Plaintiff of liability if the tiller was damaged during Plaintiff's rental. Home Depot described the terms of this offer in a proposed written contract that Plaintiff had ample opportunity to review. The contract clearly disclosed the Damage Waiver that Home Depot offered Plaintiff and the price for it. At any time before Plaintiff signed this contract, Plaintiff could have either rejected the terms Home Depot offered or negotiated to revise those terms. She did none of that. Instead, Plaintiff voluntarily accepted the

terms Home Depot offered, signed the contract, signifying her acceptance of these terms, and initialed the contract to indicate her agreement to purchase the damage waiver.

Months later, Plaintiff brought this lawsuit. Even though she never said a word to Home Depot about the damage waiver before she agreed to purchase it, Plaintiff now claims that she did not want the damage waiver, and that Home Depot somehow tricked her into buying it. She argues in this appeal: (a) that the damage waiver is a "negative option," a service that Plaintiff had to take affirmative steps to reject (rather than one Plaintiff was bound to purchase only if she affirmatively elected it); (b) that the damage waiver was not disclosed to Plaintiff as optional (even though it was offered in writing to her); and (c) that the damage waiver was worthless (even though she did not damage the tool). These claims lack factual and legal support for multiple reasons.

First, Plaintiff's contention that the damage waiver is a negative option rests on a fundamental mischaracterization of her tool rental transaction. Plaintiff did not have to take affirmative steps to reject the damage waiver, as is required for the damage waiver to be considered a negative option. Rather, Plaintiff was charged for the damage waiver only because she took an affirmative step to accept it. Before any contract existed between Plaintiff and Home Depot, Home Depot ***offered*** Plaintiff the opportunity to purchase the damage waiver. Plaintiff affirmatively accepted Home Depot's offer in writing, signing and initialing the contract to demonstrate her acknowledgement and acceptance. This is merely offer and acceptance, a routine and fundamental part of every contract. It is not a "negative option."

Second, Plaintiff's contention that Home Depot failed to inform her that the damage waiver was optional ignores the clear terms of the rental agreement, which identifies the damage waiver as an optional service that Plaintiff could freely accept or reject. Plaintiff ignores these contract disclosures and contends, based solely on her testimony (uncorroborated by any other evidence), that the Home Depot associate assisting Plaintiff with her tool rental transaction did not also orally inform her that the damage waiver was optional. Even if that testimony (which is contrary to Home Depot's policy) were true, it is not enough to sustain Plaintiff's claim. Home Depot disclosed to Plaintiff that the damage waiver was optional in the most effective way possible -- by giving her written materials describing that fact. Plaintiff's rental agreement identified the damage waiver as optional and provided Plaintiff with an opportunity to accept or reject that service. Nothing more is, or should be, required.

Finally, Plaintiff's claim that the damage waiver is worthless similarly contradicts the terms of the rental agreement. As the rental agreement makes clear, the damage waiver insulated Plaintiff from the risk that the garden tiller she rented would be damaged during normal use. As the Seventh and Third Circuits have held in interpreting the precise contract Plaintiff signed, that protection is significant, and it is certainly not worthless. *See Rickher v. Home Depot, Inc.*, 535 F.3d 661, 669 (7th Cir. 2008) (affirming district court's finding that "the Damage Waiver has value because it modifies the broad allocation of risk to the rental customer by relieving the renter from liability for accidental damage to the tool -- both when the tool is being used properly and when the tool is not being used at all") (quoting *Rickher v. Home Depot, Inc.*, No. 05 C 2152, 2007

WL 2317188, at *4 (N.D. Ill. July 18, 2007)); *Pacholec v. Home Depot U.S.A., Inc.*, 293 F. App'x 939, 940-41 (3d Cir. 2008) (same).

After years of needless litigation regarding Plaintiff's claims, the Trial Court, considering all of the evidence Plaintiff offered to support her theories, granted summary judgment in Home Depot's favor. The Court of Appeals affirmed the Trial Court's decision. In rejecting Plaintiff's claims, both courts followed the results reached in courts across the country, where virtually identical claims have, without exception, been found lacking and without merit.[6] In this Court, Plaintiff repeats the same arguments that have

[6] *See Berger v. The Home Depot U.S.A.*, Case No. 8:10-cv-00678-SJO-PLA (C.D. Cal. Mar. 22, 2011) (voluntary dismissal with prejudice following denial of plaintiff's motion for class certification); *Jeff Enters., Inc. v. Home Depot, U.S.A., Inc.*, No. 07-60302, (S.D. Fla. Apr. 17, 2008) (voluntary dismissal with prejudice following denial of plaintiff's motion for class certification); *Saab v. Home Depot U.S.A.*, No. 06-0319-CV-W-SOW (W.D. Mo. Dec. 17, 2007) (voluntary dismissal following court order dismissing plaintiff's class allegations); *Kincaid v. Home Depot, U.S.A., Inc.*, No. 06-CV-650 (Kan. Dist. Ct., Nov. 1, 2007) (granting Home Depot's motion for summary judgment); *Pacholec v. Home Depot, U.S.A, Inc.*, No. CIV06-827, 2007 WL 4893481 (D.N.J. July 31, 2007) (granting Home Depot's motion for summary judgment), *aff'd*, 293 F. App'x 939 (3d Cir. 2008) ; *Rickher v. Home Depot, Inc.*, No. 05 C 2152, 2007 WL 2317188, *4 (N.D. Ill. July 18, 2007) (granting Home Depot's motion for summary judgment), *aff'd*, 535 F.3d 661 (7th Cir. 2008); *Cook v. Home Depot U.S.A., Inc.*, No. 2:06-cv-00571, 2007

been rejected time and time again, both in this case and in other cases. As has been recognized by every court to consider them, these arguments are meritless and certainly provide no basis for overturning the Trial Court's Order. Plaintiff asks this Court to adopt a position contrary to all available American jurisprudence on this issue.

II. STANDARD OF REVIEW

The appropriate standard of review of a grant of summary judgment is essentially *de novo*. *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 113 (Mo. banc 2007). Nevertheless, "[a]n order granting summary judgment will not be set aside on review if supportable on any theory. Our primary concern is the correctness of the result in the trial court, not the route taken to reach it." *Thomas Berkeley Consulting Eng'r, Inc. v. Zerman*, 911 S.W.2d 692, 696 (Mo. App. E.D. 1995).

WL 710220 (S.D. Ohio Mar. 6, 2007) (granting Home Depot's motion to dismiss); *Fuller v. Home Depot Servs., LLC*, No. 1:06-CV-1490 (N.D. Ga. Jan. 31, 2007) (granting Home Depot's motion to dismiss); *O'Neill v. Home Depot U.S.A., Inc.*, Case No. 05-61931 (S.D. Fla. Jan. 29, 2007) (voluntary dismissal with prejudice following denial of plaintiff's motion for class certification); *Barnard v. Home Depot U.S.A., Inc.*, No. CIV 06-CA-491, 2006 WL 3063430, at *4 (W.D. Tex. Oct. 27, 2006) (granting Home Depot's motion to dismiss).

III. THE TRIAL COURT CORRECTLY HELD THAT THE DAMAGE WAIVER IS NOT A NEGATIVE OPTION, CONTRARY TO PLAINTIFF'S POINT RELIED ON A

Plaintiff's lead point on appeal -- that the damage waiver is a negative option -- is without a shred of factual or legal support. Plaintiff has raised this contention at every level of this case, but she still offers no definition of a "negative option," and she makes no effort to describe how the damage waiver Home Depot offers could somehow constitute such a scheme. There is no authority -- in Missouri or elsewhere -- that supports Plaintiff's position that offering a customer the opportunity to purchase a service in a written agreement and giving the customer the chance to review the offer (and accept it or not) somehow constitutes a "negative option." Not only is there no such authority supporting Plaintiff's position, courts have repeatedly rejected precisely this claim. Plaintiff completely ignores and fails to inform the Court of the numerous cases in which courts have already held that Home Depot's damage waiver is not a negative option. The Trial Court and the Court of Appeals properly rejected Plaintiff's contention in this regard.

A. The Damage Waiver is Not a Negative Option Under Missouri Law.

The MPA prohibits false, fraudulent or deceptive practices. *See* Mo. Stat. § 407.020. The Missouri legislature did not define deceptive practices, but granted the state's Attorney General the authority to promulgate rules necessary to the administration and enforcement of the provisions of the MPA, including the authority to promulgate rules setting out the scope and meaning of the Act. *Id.* § 407.145. Of course, no state

regulation prohibits companies from making written offers. Nevertheless, Plaintiff claims that the damage waiver is prohibited by a rule on "Unsolicited Merchandise and Negative Option Plans" promulgated by the Attorney General. That rule provides that "[i]t is an unfair practice for any seller in connection with the advertisement or sale of merchandise to bill, charge or attempt to collect payment from consumers, for any merchandise *which the consumer has not ordered or solicited*." 15 CSR 60-8.060 (emphasis added)**.** This rule plainly does not apply here because Plaintiff unquestionably ordered ***and*** solicited the damage waiver. She agreed to pay for it in writing and benefited from its protection. Had Plaintiff not agreed in writing to accept the damage waiver, Home Depot could not have charged her for it. Therefore, the damage waiver is not a negative option.

1. Plaintiff Ordered And Solicited The Damage Waiver.

The terms of Plaintiff's contract make clear that she "ordered" or "solicited" the Damage Waiver. The rental agreement revealed to Plaintiff *in three separate provisions* that the damage waiver is included only if Plaintiff affirmatively elected to purchase it: (1) the damage waiver is identified as a separate charge in the rental agreement, distinct from the rental fees and any applicable taxes; (2) the "Special Terms and Conditions," a section of the contract that Plaintiff separately initialed, noted that the damage waiver did not apply in all tool rental transactions and, thus, could be declined; and (3) on the second page of the rental agreement, where the rental agreement makes clear that the damage waiver modifies the contract terms only "[i]f I pay the damage waiver charge . . ." LF 28, 29. The word "if," which is used to begin this paragraph, conveys that the damage

waiver is conditional, applying only if the customer elects to pay the charge for it. *See* The American Heritage College Dictionary, 3d ed., p. 675 (defining "if" as meaning "on the condition that"); *see also Rickher*, 2007 WL 2317188, at *4 ("The above-emphasized language indicates that the damage waiver charge is optional."); *Pacholec v. Home Depot U.S.A., Inc.*, No. CIV06-827, 2007 WL 4893481, at *5 (D.N.J. July 31, 2007) ("[T]he optional nature of the Damage Waiver was disclosed in the Rental Agreement.").

The written contract clearly revealed to Plaintiff that the damage waiver applied only "if" Plaintiff paid for it and only if she "accepted" (or "ordered") it. LF 28. These disclosures are more than sufficient to inform Plaintiff that the damage waiver was not mandatory in her transaction -- she could have declined it, as thousands of other Home Depot customers have done. Plaintiff admits that Home Depot did not force her to sign this contract or prohibit her from reviewing its terms. LF 630. More importantly, Plaintiff herself testified that she understood the rental agreement was Home Depot's offer and that by signing the agreement she was accepting those terms, including the damage waiver:

Q: So this is the terms under which Home Depot was willing to rent you the tiller, correct?

A: Yes.

Q: And by signing this agreement, you agreed to those terms, correct?

A: Yes.

LF 490-91. Having voluntarily accepted these proposed terms, Plaintiff cannot contend that she did not "order[]" or "solicit[]" the damage waiver.[7]

As the Eighth Circuit recently recognized, a contract provision is *not* a negative option when the consumer "had ample opportunity and time to opt out of the" provision before she was obligated to purchase it. *Cicle v. Chase Bank USA*, 583 F.3d 549, 555 (8th Cir. 2009). Just as in *Cicle*, the Plaintiff here "affirmatively accepted" the damage waiver. *Id.* And like the Eighth Circuit in *Cicle*, the Court of Appeals here correctly held that the damage waiver cannot be considered a negative option in light of Plaintiff's opportunity to decline it. Slip. op. at 8 ("[T]he Damage Waiver is not a 'negative option' because Appellant had a chance to read and review the Rental Agreement prior to signing it, and did not have to initial her consent to the optional Damage Waiver. Appellant was charged the $2.50 fee for the Damage Waiver service offered by [Home Depot] and accepted by her.").

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[7] Plaintiff's affirmative act in accepting the damage waiver distinguishes this transaction from those that courts have held to involve a negative option. *See, e.g.*, *Stephenson v. Bell Atl. Corp.*, 177 F.R.D. 279 (D.N.J. 1997) (describing a "negative option" or "default" sales scheme as one that *automatically* enrolls customers in a maintenance service plan unless they expressly notified defendant that such service was unwanted); *Gowdey v. Commonwealth Edison Co.*, 345 N.E.2d 785 (Ill. Ct. App. 1976) (characterizing a "negative option" as one in which a light bulb service was included in a customer's bill unless it was specifically rejected).

Plaintiff argues that these contract disclosures can be ignored because Home Depot "seeks to use the fine print in its adhesion contract to nullify the express provisions of 15 CSR 60-8.060." Sub. Br., p. 25. Further, Plaintiff attempts to analogize this transaction to one where a retailer secretly adds a charge to a "final" bill. Sub. Br. at 26. These arguments ignore the facts in this case and mischaracterize the nature of Plaintiff's tool rental transaction. Home Depot did not add the damage waiver to a "final" bill. Home Depot offered Plaintiff the opportunity to purchase the damage waiver along with the terms for the tool rental -- ***before*** Plaintiff even agreed to rent the tool, much less to purchase the damage waiver or was in any way required to pay for the damage waiver charge. *See* LF 11; LF 28-29.[8] Plaintiff was not obligated to pay for the damage waiver until (1) she received the disclosures that made clear she could accept or decline that service and (2) Plaintiff indicated, by signing and initialing her rental agreement and the special terms and conditions, that she accepted that service. *Id.* Unlike customers impacted by true negative option schemes, Plaintiff voluntarily accepted the damage waiver at a time when she could easily decline it in the store during a face-to-face transaction. The damage waiver is merely an option, not a negative option.

[8] In addition, these disclosures were not contained in "fine print," as Plaintiff contends. Rather, these disclosures were prominently displayed, some with bold lettering and in all capital letters. *See* LF 11; LF 28-29. Even with her purported "bad eyes," Plaintiff admitted that she was able to read and understand these disclosures. LF 627.

2. Accepting Plaintiff's Reasoning Would Frustrate The Public Policy Underlying The MPA.

The position Plaintiff asserts -- that it is an improper practice to include a clearly disclosed term in a contract without first discussing the term with the consumer -- finds no support in Missouri law, would be unworkable if adopted as the law in Missouri, and would conflict with the purpose of the MPA and suffocate the free flow of commerce the MPA is intended to preserve. The purpose of the MPA is to "preserve fundamental honesty, fair play and right dealings in public transactions." *State ex rel. Koster v. Portfolio Recovery Assocs., LLC*, 351 S.W.3d 661, 664 (Mo. App. E.D. 2011). Stifling commerce by refusing to enforce a freely bargained agreement Plaintiff voluntarily accepted during an in-person transaction would not further the interest of preserving "fair play and right dealings." *Id.*

Plaintiff's argument, in essence, is that an offered service is transformed into an illegal negative option simply because the customer is asked to decline or accept the offer. Such misguided logic would stand basic contract law on its head. Offer and acceptance (or rejection) of the offer are the fundamental tenets of contract law. *See, e.g., U.S. Bank v. Lewis*, 326 S.W.3d 491, 495 (Mo. App. S.D. 2010) (stating that the basic elements of a contract are offer, acceptance and consideration). Nothing more occurred here.

Plaintiff acknowledges that no one from Home Depot hid from her the terms of the rental agreement, and she concedes that Home Depot did not prevent her from reviewing

the contract before she signed it. LF 627.[9] She even concedes that, once she took the time to review the contract, she understood the damage waiver charge. Sub. Br., p. 4. The MPA does not allow one to avoid the unambiguous terms of a contract. *See Nixon v. Enter. Car Sales Co.*, No. 4:09CV1896, 2011 WL 4857941, at *7 (E.D. Mo. Oct. 13, 2011) (finding that plaintiff's MPA claims fail because she had signed the contracts containing the disputed terms and stating that her "decision to bypass reading the contracts she entered into are by no means a sufficient excuse to avoid the validity of these instruments."); *Binkley v. Palmer*, 10 S.W.3d 166, 171 (Mo. App. E.D. 1999) ("It has long been settled in Missouri that absent a showing of fraud, a party who is capable

[9] This is true notwithstanding Plaintiff's testimony regarding what she was allegedly told after she returned her tool. *See* Sub. Br., pp. 4. Even accepting Plaintiff's recollection regarding her after-the-fact conversation with a Home Depot associate (which would violate Home Depot's policy and conflict with the language of the contract), Plaintiff cannot avoid the terms of her contract. *See id.; Williams v. Mercantile Bank of St. Louis NA*, 845 S.W.2d 78, 84 (Mo. App. E.D. 1993) (concluding that alleged reliance on statements made after contract was executed could not save Plaintiff's fraud claim related to the contract terms). In other words, whatever Plaintiff was told after she returned the tool could not have been the legal cause of her decision to purchase the damage waiver in the first place. Further, having used the tool while benefiting from the protection of the damage waiver that she agreed in writing to purchase, Plaintiff was not thereafter entitled to refuse to pay for the protection from liability she had received.

of reading and understanding a contract is charged with the knowledge of that which he or she signs.").

The limited Missouri authority construing the Attorney General's "negative option" regulation makes clear that the damage waiver is not a negative option as the Attorney General intended to prohibit. The only authority Plaintiff relies on in support for her claim that the damage waiver is a negative option is dicta in *Huch v. Charter Communications, Inc.*, 290 S.W.3d 721, 723 (Mo. banc 2009). *See* Sub. Br., pp. 22-26. *Huch* in no way supports Plaintiff's position; it merely highlights the differences between Plaintiff's damage waiver and a true negative option scheme.

In *Huch*, the defendant sent a television guide to the plaintiffs, a product that the plaintiffs had never requested and the defendant had not previously informed the plaintiffs that the defendant intended to provide. *Huch*, 290 S.W.3d at 723. Without informing the plaintiffs that they could decline the guide or that retaining the guide would obligate the plaintiffs to pay a fee, and without any contract or written materials that addressed the guide at all, the defendant then included a charge for the guide on the plaintiffs' monthly bill. *Id.*; *see also* 2008 WL 1721868, at *1 (Court of Appeals opinion discussing background facts). The plaintiffs claimed that the defendant's practice and its attempt to collect the charge violated the MPA. *Huch*, 290 S.W.3d at 743. The defendant sought dismissal of the complaint, arguing that the voluntary payment doctrine barred the plaintiffs' MPA claims. *Id.* The trial court granted the defendant's motion to dismiss, the Court of Appeals affirmed, and the case was ultimately transferred to the Supreme Court. *Id.* The Supreme Court rejected the defendant's contention that the voluntary payment

doctrine applied to the plaintiffs' MPA claims and overturned both the trial court and the Court of Appeals. *Id*. at 727.[10] The Court also noted, without deciding the issue, that the defendant's attempt to charge for the guide could constitute a negative option. *Id*.

The Court's dicta in *Huch* -- suggesting that the scheme at issue there could constitute a negative option -- has no relevance to this case given the substantially different facts at issue here. A tool rental is a face-to-face, in-person transaction with considerable interaction between customers and Home Depot associates and, most significantly, culminates in a written contract. In Plaintiff's transaction, unlike the circumstances in *Huch*, Home Depot (1) disclosed the damage waiver to Plaintiff; (2) disclosed to Plaintiff that the damage waiver was optional; (3) gave Plaintiff written materials making clear that she could decline the damage waiver; and (4) provided all of this information before even asking Plaintiff if she wanted to pay for the damage waiver. *See* LF 11; LF 28-29. Plaintiff then agreed in writing to purchase the damage waiver. Home Depot did not force the damage waiver on Plaintiff inconspicuously, without informing Plaintiff of the service or how she could decline it. *Id.* The television guide scheme in *Huch* is nothing like the facts presented in Plaintiff's tool rental transaction.

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[10] The Court's holding in *Huch* is in no way implicated here because, unlike the defendant in *Huch*, Home Depot did not claim that the voluntary payment doctrine entitled it to summary judgment.

B. Courts Have Repeatedly Rejected Plaintiff's Contention That The Damage Waiver Is A Negative Option.

In other cases asserting similar claims against Home Depot regarding the damage waiver, Plaintiffs have similarly claimed that the damage waiver is a negative option. *See, e.g., Rickher*, 2007 WL 2317188, at *6 (describing Plaintiff's contention that the damage waiver is a negative option); *Pacholec*, 2006 WL 2792788, at *1 (same); *Barnard v. Home Depot U.S.A., Inc.*, No. CIV A 06-CA-491, 2006 WL 3063430, at *4 (W.D. Tex. Oct. 27, 2006) (same); *Cook v. Home Depot U.S.A., Inc.*, No. 2:06-cv-00571, 2007 WL 710220, at *6 (S.D. Ohio Mar. 6, 2007) (same). In every case where a court has considered this contention, it has been rejected. *See, e.g., Rickher*, 2007 WL 2317188, at *6; *Cook*, 2007 WL 710220, at *8 (noting that a person "cannot be heard to say that he was misled into signing a paper which was different from what he intended, when he could have known the truth by merely looking when he signed") (citing *ABM Farms, Inc. v. Woods*, 692 N.E.2d 574, 579 (Ohio 1998)); *Barnard*, 2006 WL 3063430, at *4 ("Absent fraud, Plaintiff is presumed to have known the contents of a document that he signed, and has an obligation to protect himself by reading a document before signing it. . . [Therefore,] Plaintiff is presumed to have known that the damage waiver was optional.").

As these courts have recognized, the clear terms of the rental agreement reveal that the damage waiver is optional and is included in the rental agreement only if customers elect to purchase it. *Rickher*, 2007 WL 2317188, at *4; *Pacholec*, 2007 WL 4893481, at *5 ("[T]he optional nature of the Damage Waiver was disclosed in the Rental

Agreement.").[11] Because customers are not charged for the damage waiver unless they agree to purchase it in writing, the damage waiver is not a negative option. *Id.*

Plaintiff attempts to brush these cases aside. Indeed, her Substitute Brief mentions only two of these cases by name, attempting to dismiss the holdings in *Rickher* and *Pacholec* in a single footnote. *See* Sub. Br., p. 21, n.1. Plaintiff contends that those decisions "did not consider the MPA or 15 CSR 60-8.060."[12] *Id*. Plaintiff does not claim that a "negative option" is defined differently in Missouri than in Illinois or New Jersey, and she does not claim that the contract terms at issue in *Rickher* or *Pacholec* are in any way different than the contract terms at issue in this case. In fact, as Home Depot described to the Trial Court, Plaintiff originally filed this case in Illinois, sought relief under the same consumer protection statute at issue in *Rickher*, and, once she finally began to pursue a claim under the MPA, argued that the Illinois consumer protection statute and the MPA were substantially similar. Particularly given the procedural history

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[11] *See also O'Neill*, 243 F.R.D. at 472 ("The Terms and Conditions page describes the damage waiver and informs the customer that the damage waiver is optional."); *Cook*, 2007 WL 710220, at *6 (describing the contract disclosures that reveal the optional nature of the damage waiver).

[12] Plaintiff's contention is incorrect. In *Rickher*, the plaintiff supported his negative option argument by citing 15 CSR 60-8.060, among other provisions. *See Rickher v. Home Depot, Inc.*, Case No. 1:05-cv-02152 (N.D. Ill. Mar. 15, 2007) (ECF No. 83, Ex. 10). The court rejected this argument for precisely the same reasons this Court should.

of this case, the conclusion in *Rickher*, just like the conclusions reached by numerous other courts rejecting similar claims, is on all fours here. As the court recognized in *Rickher*, the damage waiver is not a negative option because "plaintiff was given a written contract" that disclosed the optional nature of the damage waiver and provided Plaintiff an opportunity to decline the damage waiver "before signing" the contract. *Rickher*, 2007 WL 2317188, at *6. Like the plaintiff in *Rickher*, Plaintiff here has provided no authority whatsoever supporting the contention that such a contract amounts to a negative option. *Id.* It does not, as described above. If this Court accepts Plaintiff's argument, Missouri would be left standing alone in American jurisprudence on this issue.

IV. PLAINTIFF'S POINT RELIED ON B OFFERS NO BASIS TO OVERTURN THE ORDER; THE TRIAL COURT CORRECTLY HELD THAT PLAINTIFF'S CONTRACT REVEALED THE OPTIONAL NATURE OF THE DAMAGE WAIVER.

Plaintiff appears to contend that even if the damage waiver is not a negative option, it nevertheless violates the MPA because Plaintiff was not informed that the damage waiver is optional. Sub. Br., pp. 27-30. This contention flies in the face of Plaintiff's rental agreement. The Court of Appeals rejected this contention and thereby joined every other court that has addressed the terms of the rental agreement. *See* Slip.

op. at 7-8 ("[T]he Rental Agreement itself unambiguously discloses the optional nature of the Damage Waiver. . . . We find no unfair practice here.").[13]

A. Plaintiff's Attempt To Avoid The Terms Of Her Rental Agreement Fails.

The facts developed in the Trial Court -- described above -- identify the myriad ways that the rental agreement revealed that the damage waiver is optional. Plaintiff contends that all of these disclosures are insufficient. She claims that the words "if applicable" do not convey that the damage waiver is optional. *Id.* But the word "if" clearly conveys the conditional nature of the damage waiver. Using "if applicable" cannot suggest that the damage waiver is mandatory. *See* Section III.A.1, *supra.*

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[13] Plaintiff argues that Home Depot's later versions of the rental agreement somehow suggest that her agreement contained inadequate disclosures regarding the damage waiver. Sub. Br. at 8-9. These changes to the tool rental contract, made subsequent to Plaintiff's transaction, cannot be used to prove culpable conduct. *See Wingate v. Lester E. Cox Med. Ctr.*, 853 S.W. 2d 912, 917 (Mo. banc 1993); *Pastor v. State Farm Mutual Auto. Ins. Co.*, 487 F. 3d 1042, 1045 (7th Cir. 2007). In any event, these other versions of the rental agreement -- that Plaintiff did not receive and never saw -- are irrelevant in evaluating the language in Plaintiff's contract. As described below, every court to have examined Plaintiff's version of the agreement has concluded that its disclosures regarding the damage waiver are sufficient. *E.g., Rickher*, 2007 WL 2317188, at *4; *Pacholec*, 2007 WL 4893481, at *5.

Plaintiff also argues that Home Depot's disclosures "do not explain what a damage waiver is." Sub. Br., p. 28-29. Plaintiff makes no effort to tie this argument to a point she claims to constitute error in the Trial Court's Order. In any event, her contention ignores the separate paragraph of the rental agreement dedicated entirely to providing a definition of the "damage waiver." LF 29. Even that paragraph clearly discloses the optional nature of the damage waiver, making clear that the damage waiver only applies "[i]f" Plaintiff agreed to pay for it. LF 505; *see also Rickher*, 2007 WL 2317188, at *6 ("the optional nature of the damage waiver was disclosed in the Rental Agreement."); *Pacholec*, 2007 WL 4893481, at *5 (same).

Plaintiff's own testimony does not support the construction of the rental agreement she now offers on appeal. During her deposition, she did not claim that she did not understand this contract or the disclosures regarding the optional nature of the damage waiver. LF 630. In fact, Plaintiff admitted that she was able to read and understand these disclosures. LF 627. She admitted that her claim of deception is not based on the terms of the contract. *Id.* Instead, Plaintiff argued that she can ignore these contract terms and claim to have been deceived because of what she understood a single Home Depot associate told her after she returned the tool and inquired about the damage waiver. *See* LF 633.

Even assuming Plaintiff's allegations in this regard to be true, Home Depot is still entitled to summary judgment. Under basic contract principles, at the time Plaintiff signed the agreement and initialed her acceptance of the damage waiver the parties were mutually bound to each other -- Home Depot to provide the appropriate tool at the quoted

rate and subject to the protection of the damage waiver; Plaintiff to pay the agreed-upon rate for the tool and for the damage waiver she purchased. Nothing subsequent to that point in time could change the parties' obligations to each other.[14]

Plaintiff acknowledges that when she executed the rental agreement no one from Home Depot hid from her its terms, and she concedes that Home Depot did not prevent her from reviewing the contract before she signed it. *See* LF 627. Because Missouri law imposes on Plaintiff the duty to read the contract that she signed, she cannot now attempt to avoid the contract's unambiguous terms by claiming that she did not know about them. *See Binkley*, 10 S.W.3d at 171. In other words, Plaintiff cannot claim to have been deceived by the agreement simply because she chose not to read it. Thus, even accepting Plaintiff's recollection regarding her after-the-fact conversation with a Home Depot

[14] Plaintiff acknowledges while driving home from the store she understood she was being charged for the damage waiver, but decided to wait until she returned the tool to ask about the charge. LF 484, 491, 492. Whether by design or not, this approach would have allowed Plaintiff to make a hindsight determination regarding the damage waiver. If she damaged the tool, she would be protected by the damage waiver; if not, then she could claim she had not consented to purchasing it. But in the same way that Home Depot was not entitled to increase the rental rate after Plaintiff returned the tool, she was not entitled to change her selection of the damage waiver, particularly after having benefited from its protection. A fundamental principle of contract law is that each party's obligations must be known and agreed to before the transaction, not after.

associate, the Court of Appeals correctly held that Plaintiff cannot avoid the terms of her contract. *See* Slip. op. at 7-8.

The District Court's conclusion in *Lingo v. Hartford Fire Insurance Co.*, No. 4:10CV84MLM, 2011 WL 1642223, at *7 (E.D. Mo. May 2, 2011) squarely addresses Plaintiff's argument here regarding these contract disclosures. In *Lingo*, the plaintiff claimed that the defendant improperly induced the plaintiff to enter into a contract based on the defendant's alleged oral representations regarding the contract terms. *Lingo*, 2011 WL 1642223, at *3. The plaintiff also asserted a claim under the MPA based on the same facts. *Id*. The court granted summary judgment to the defendant on both claims, holding that "[e]ven assuming, arguendo, that, at the time he signed the loan agreements, Plaintiff did not understand what an ARM was, parties who sign contracts are bound by them, regardless of whether they understood what they signed." *Id*. at *7. In rejecting the plaintiff's MPA claim, the court also held that "the undisputed facts establish that [the defendant] did not conceal anything from Plaintiff" because the contract Plaintiff voluntarily signed disclosed the facts that he claimed to have been withheld in oral discussions regarding the parties' contract. *Id.* at * 9.[15]

[15] Plaintiff asks that this Court limit *Lingo* to "its 'unique facts,' because "simply adding boilerplate language to its contract of adhesion would nullify [15 CSR 60-8.060] and be contrary to the MPA." Sub. Br., p. 25. Plaintiff's argument in this regard is just a rehash of her incorrect position that the damage waiver is a negative option. In addition, Home Depot has not attempted to avoid its obligations under the MPA. In this

Plaintiff here concedes that she was able to read and understand the rental agreement, and she concedes that no one from Home Depot prevented her from reading the rental agreement before she signed it. LF 630. Plaintiff, who voluntarily signed her contract, is "bound by [it], regardless of whether [she] understood what [she] signed." *Lingo*, 2011 WL 1642223, at *7. In addition, and even more than the plaintiff in *Lingo*, Plaintiff cannot avoid the terms of her contract because the rental agreement contains a merger and modification clause. That clause precludes Plaintiff's attempt to rely on representations concerning the damage waiver that were not contained in the rental agreement, and that occurred (if at all) well after Plaintiff executed the agreement. According to this clause, Plaintiff expressly disclaimed any reliance or consideration of any statement outside the rental agreement. LF 28.

Plaintiff agreed that any representations inconsistent with those contained in the rental agreement do not modify the rental agreement itself. *Id.* ("I understand and agree that no representative of THE HOME DEPOT is authorized to make any oral or written promise, affirmation, warranty or representation to me other than those reflected in writing in this agreement."); *see also Am. Realty Trust v. First Bank*, 902 S.W.2d 884,

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transaction, Home Depot provided Plaintiff with written disclosures offering Plaintiff the option to accept or decline the damage waiver before she had any obligation to purchase that service. Plaintiff did not need to take affirmative steps to avoid purchasing the damage waiver -- she could not have been charged for the damage waiver until she agreed in writing to purchase it. *See Cicle*, 583 F.3d at 555.

887 (Mo. App. W.D. 1995) (merger clause barred consideration of representations not contained in contract). Plaintiff also initialed next to language indicating that she "underst[ood] and agree[d] that no representative of The Home Depot is authorized to make any oral or written promise ... other than those contained in writing in this agreement." LF 28. The agreement's merger clause prohibits Plaintiff from relying on extra-contractual representations -- an alleged discussion with a Home Depot associate well after she signed the contract and had used the damage waiver service -- to modify the terms of her executed contract here.

B. All Courts Considering The Rental Agreement Have Concluded That It Discloses The Damage Waiver As An Optional Service.

The Court of Appeals correctly found that "the Rental Agreement itself unambiguously discloses the optional nature of the damage waiver. Appellant cites no authority in support of her contention that there exists an independent obligation for an extra oral recitation of the contents of the rental agreement. We find no unfair practice here." Slip. op. at 7-8. Courts around the country have agreed and have unanimously held as a matter of law that the rental agreement discloses the optional nature of the damage waiver:

> [T]he evidence demonstrates that ***Home Depot did in fact disclose that the waiver was optional in the plain language of the Rental Agreement.*** The Terms Page of the Rental Agreement stated:
>
> "Damage Waiver. *If I pay the damage waiver charge* for any Equipment, this agreement shall be modified to relieve me of liability for accidental

> damage to it . . .” Moreover, the Front Page of the Rental Agreement in most instances of plaintiff’s rentals stated: “I ACCEPT THE BENEFITS OF THE DAMAGE WAIVER (IF APPLICABLE) DESCRIBED IN PARAGRAPH 11 IN THE TERMS AND CONDITIONS OF THIS RENTAL AGREEMENT.” . . . The damage waiver charge was listed separately from the rental charge on the Front Page, and unlike the situation in the case cited by plaintiff, the damage waiver was not labeled deceptively; it was listed correctly as a “Damage Waiver.”

Rickher, 2007 WL 2317188, at *4 (emphasis added); *Pacholec*, 2007 WL 4893481, at *5 (“[T]he optional nature of the Damage Waiver was disclosed in the Rental Agreement.”). Indeed, courts have repeatedly and uniformly construed this language precisely as did both the Trial Court and the Court of Appeals in this case; *O’Neill*, 243 F.R.D. at 472 (“The Terms and Conditions page describes the damage waiver and informs the customer that the damage waiver is optional.”).

In other cases regarding Home Depot’s damage waiver, courts have concluded that Home Depot’s damage waiver is presented in the rental agreement as optional and have rejected claims that alleged otherwise. In *Barnard*, 2006 WL 3063430, at *4, for example, the court granted Home Depot’s motion to dismiss and held that because the plaintiff “has an obligation to protect himself by reading a document before signing it,” the plaintiff “is presumed to have known that the damage waiver was optional.” *See also Cook*, 2007 WL 710220, at *6 (dismissing claim that plaintiff was “coerced [into]

purchasing . . . a 'negative option' because the plaintiff "had a duty to read the rental agreement that he initialed and signed and later confirmed with payment").

Plaintiff's claims in this case are no different than those rejected by every other court to construe Home Depot's rental agreement. "Home Depot did in fact disclose that the waiver was optional in the plain language of the Rental Agreement," *Rickher*, 2007 WL 2317188, at *4, and, as the Trial Court held, Plaintiff's claims to the contrary cannot stand as a matter of law. *See Ports Petroleum Co. of Ohio v. Nixon*, 37 S.W.3d 237, 240 (Mo. banc 2001) (concluding that there could be no MPA violation when there is no unfair practice).

V. CONTRARY TO PLAINTIFF'S POINT RELIED ON C, THE TRIAL COURT CORRECTLY HELD THAT THE DAMAGE WAIVER PROVIDED PLAINTIFF WITH REASONABLE VALUE.

Plaintiff contends that the Trial Court erred in dismissing this claim, but she offers no support for her argument that the damage waiver provides no value. None.[16] She does not even discuss the language of the rental agreement, let alone describe how, under the rental agreement, the damage waiver provides no value. She makes no attempt in this regard because, as the Court of Appeals held, "the clear terms of the Rental Agreement belie this blanket claim about the value of the damage waiver." Slip. op. at 8. Plaintiff's Substitute Brief focuses on whether the cost of the damage waiver has a "relation to the

[16] Similarly, Plaintiff's transfer application did not seek review of the Court of Appeal's affirmance of summary judgment on this claim.

value of any services [Home Depot] might render." Sub. Br., p. 30. Even accepting Plaintiff's contention about the cost of the damage waiver to Plaintiff ($2.50), the damage waiver is not rendered worthless because its cost is "arbitrary." *Id.* Neither the cost of the damage waiver nor the revenue Home Depot collects from the damage waiver impacts the question before the Trial Court on Home Depot's motion for summary judgment or the question before this Court on appeal: Does the damage waiver provide value?[17] The Trial Court did not err in reaching this conclusion here. *Cf. Haretuer v. Klocke*, 709 S.W.2d 138, 139 (Mo. App. E.D. 1986) (noting reluctance of courts to evaluate the value of consideration supporting a contract); *Fineman v. CitiCorp USA, Inc.*, 485 N.E.2d 591, 593 (Ill. App. Ct. 1985) ("It is not the function of either the circuit court or this court to review the amount of the consideration which passed to decide whether either party made a bad bargain.").

A. As The Contract Terms Make Clear, The Damage Waiver Is Not Worthless.

Plaintiff's rental agreement explains her obligations under the agreement, including expressly setting forth in Paragraph 3 that Plaintiff bore the risk of loss for any damage to the rented tool:

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[17] Likewise, Plaintiff ignores the undisputed fact that Home Depot's costs in relieving customers of liabilities pursuant to the damage waiver are actually far greater than the revenue generated by damage waiver sales. LF 916.

I agree that, upon execution of this agreement, ***I assume all risks of loss, theft, damage or destruction, partial or complete, of the Equipment from any and every cause whatsoever.***

LF 28. Thus, as the Court of Appeals correctly found, the damage waiver provides protection from liability for potentially expensive repair costs in exchange for a small fee. *See* Slip. op. at 9 ("The Damage Waiver has value because it modifies the broad allocation of risk to Appellant by 'relieving [her] from liability for accidental damage to the tool, both when the tool is being used properly and when the tool is not being used at all.'") (quoting *Rickher v. Home Depot, Inc.*, 535 F.3d 661, 668-69 (7th Cir. 2008)).

Aside from the damage waiver, no other provision of the agreement modifies the renter's risk of loss for damage to the tool. In fact, other provisions of the rental agreement that address this issue also make clear that all risk of loss is on the renter. *See* LF 29 ("[Customer] agree[s] to indemnify [Home Depot] . from . . . all liabilities . . . for all . . . damage to any property . . . arising from . . . my possession [and] use ... of any of the Equipment"); *Id.* (providing that Home Depot may recover "(b) any expenses and losses incurred . . . in connection with the . . . repair ... of the Equipment . . .; (c) the Stipulated Loss Value for any item of Equipment that [Customer] . . . destroy[s] . . . .").

For tool rental customers who elect to purchase the damage waiver, like Plaintiff, the rental agreement shifts certain, specific risks of loss back to Home Depot. According to Paragraph 11 of the rental agreement, because Plaintiff purchased the damage waiver, "this agreement shall be modified to relieve me of liability for accidental damage" to the

equipment. LF 28. This modification relieved Plaintiff from some of the potential liability imposed by Paragraph 3 of the rental agreement. Given the potential cost to repair or replace a damaged garden tiller, this protection from liability for accidental damage was significant and certainly not worthless. *See Rickher*, 535 F.3d at 665 ("[T]he Rental Agreement clearly allocates all risks to the customer -- the Risk of Loss provision in paragraph 3 states that the customer is responsible for all damage and loss to the rented item.").

During discovery in this case, Home Depot's corporate representative, Mr. Lewis, provided a laundry list of examples where customers have benefited from the protection provided by the damage waiver. Based on years of experience renting tools to Home Depot customers, Mr. Lewis described specific types of damage to tools including cement mixers, rota hammers, generators, drain cleaners, pneumatic hammers, ground compactors, paint sprayers, weed eaters, carpet cleaner, ladders, and scaffolding where, if a customer purchased the damage waiver, the customer would not have to pay for that damage. LF 642-650. In all of these instances, and others not specifically identified during Mr. Lewis's deposition, the damage waiver "relieved [customers] of liability for accidental damage" to the rented tool that, absent the customer's purchase of the damage waiver, would be the customers' responsibility. *Id.*

Yet Plaintiff has failed to address this testimony before the Trial Court, the Court of Appeals or this Court. She has offered no evidence to dispute this testimony, and she does not argue that the protection provided by the damage waiver, as evidenced in this testimony, did not benefit Plaintiff during her rental transaction. Plaintiff admits that she

did not damage the tool she rented from Home Depot (LF 634) and, thus, had no occasion to test the limits of protection provided by the damage waiver.[18] Plaintiff presented no facts to suggest that the damage waiver is worthless, and she has offered no argument to contradict the undisputed evidence Home Depot presented to the Trial Court. As is plain from the face of the contract and from the facts developed in discovery here, the damage waiver has value. Faced only with undisputed evidence demonstrating the broad array of situations where the damage waiver provided protection to Home Depot customers, the Trial Court and the Court of Appeals did not err in concluding that the damage waiver has value.

B. All Courts Considering The Rental Agreement Have Concluded That The Damage Waiver Provides Reasonable Protection.

Even more striking than Plaintiff's refusal to acknowledge the undisputed facts regarding the value of the damage waiver is her attempt to ignore the voluminous authority from other courts rejecting this precise claim. Every court that has considered the rental agreement has agreed with the Court of Appeals that the damage waiver

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18 Plaintiff appears to question why she had to pay for the damage waiver given that she "did not break the tiller." Sub. Br. p. 4. In the same way that the value of automobile insurance is not contingent on getting into a wreck during the policy period, the value of the damage waiver is not determined by a hindsight view of whether a tool was damaged or not. Rather, the damage waiver provides value by protecting a customer from liability in the event that a customer accidentally damaged a tool during a rental.

provides reasonable protection, and, therefore, has value. *See* Slip. op. at 9 ("The Damage Waiver has value because it modifies the broad allocation of risk to Appellant by 'relieving [her] from liability for accidental damage to the tool, both when the tool is being used properly and when the tool is not being used at all."). For example, the Seventh Circuit in *Rickher* construed the rental agreement and concluded, as a matter of law, that the damage waiver had value. Just like Plaintiff here, the *Rickher* plaintiff argued: "[T]he Damage Waiver is a worthless product, and charging customers a fee for a worthless product is deceptive and unfair . . . ." *Rickher*, 535 F.3d at 665.

The Seventh Circuit rejected the plaintiff's argument that the damage waiver was worthless and unequivocally held that Home Depot's damage waiver has value. *Id*. at 669-70. According to the Circuit Court of Appeals,

> The Damage Waiver, by its plain language, states that it protects customers from liability for accidental damage to the tool. As the district court decided, the Damage Waiver has value because it modifies the broad allocation of risk to the rental customer by "relieving the renter from liability for accidental damage to the tool --both when the tool is being used properly and when the tool is not being used at all."

Id. Further, the Seventh Circuit held that according to the terms of the rental agreement, the damage waiver provides value, "effectively alleviating] some of the customer's liabilities." *Id.* Indeed, "[c]harging customers for the waiver and its corresponding shifting of risks is an acceptable arrangement that appears neither deceptive, nor unfair." *Id.*

The Third Circuit in *Pacholec* similarly affirmed dismissal of the plaintiff's claim that the damage waiver was worthless:

> The Rental Agreement places the risk of loss on the renter in every instance, though it excuses that renter from paying for the "reasonable wear and tear resulting from proper use." By comparison, the Damage Waiver relieves the customer of "liability for accidental damage to [the tool], but not for any losses or damages due to theft, burglary, misuse or abuse, theft by conversion, intentional damage, disappearance or any loss due to [the renter's] failure to care properly for such equipment in a prudent manner." Although the plaintiffs argued that these provisions are essentially two ways of saying the same thing, the District Court disagreed. . . . Because we agree with the District Court's reasoning, we affirm the entry of summary judgment in favor of Home Depot.

Pacholec, 293 Fed. Appx. at 940.

This appellate authority is consistent with the conclusions reached by all trial courts to have considered the language of the rental agreement.

- ***"[T]he plain language of the Rental Agreement demonstrates that the damage waiver does have value.*** It modifies the broad allocation of risk in paragraph 3 of the Terms Page by relieving the renter from liability for accidental ***damage*** to the tool -- both when the tool is being used properly and when the tool is not being used at all." *Rickher*, 2007 WL 2317188, at *8 (emphasis added).

- ***"Here, as the Court has found, there was value to the Damage Waiver.*** It does not constitute and [sic] unconscionable commercial practice." *Pacholec*, 2007 WL 4893481, at *4 (emphasis added).
- "Further, notwithstanding Plaintiffs conclusion that the insurance was worthless, ***the terms and conditions of the Damage Waiver suggest Plaintiff received reasonable insurance coverage.*** In exchange for 10 percent of the rental cost ($26 here), Home Depot assumed liability for 'accidental damage' to the equipment that would likely prove far more costly. This arrangement can hardly be described as commercially unreasonable." *Cook*, 2007 WL 710220, at *7 (emphasis added).
- "Consequently, the Damage Waiver would shield a customer from liability stemming from any damage sustained by the equipment during normal use that is more extensive than normal wear and tear, and as a result, ***the Damage Waiver does have value***." *Jeff Enterprises*, Slip Op. at 10 (emphasis added).
- "In conclusion, ***the plain language of the rental agreement demonstrates that the damage waiver does have value to a tool rental customer.*** According to its own terms, it modifies the risk of loss allocation in paragraph 3 of the rental agreement by relieving the tool rental customer of liability for accidental damage to the tool, either when the tool is being used properly, or when the tool is not being used at all. Such liability is clearly placed on the customer by paragraph 3 of the agreement, if the damage waiver is not purchased." *Kincaid*, Slip Op. at 12 (emphasis added).

- *Barnard*, 2006 WL 3063430, at 1 (dismissing claim based on allegation that the damage waiver is worthless or "essentially worthless").

Plaintiff's claim that the damage waiver is worthless is no different than the claims rejected in these cases. The damage waiver provides reasonable protection and is not worthless. As the Seventh Circuit correctly found, "'the plain language of the Rental Agreement demonstrates that the Damage Waiver does have value,'" and "Home Depot is entitled to charge customers a price in exchange for its waiver of some of the customer's baseline liability under the Rental Agreement." *Rickher*, 535 F.3d at 670. The damage waiver provides reasonable protection, and is not worthless.

CONCLUSION

Plaintiff has no basis for asserting her claims against Home Depot in this matter. The Trial Court correctly rejected Plaintiff's claims as a matter of law and the Court of Appeals correctly affirmed. Plaintiff has presented no basis for overturning the Order. It should be affirmed.

This 15th day of October, 2012

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CERTIFICATE OF COMPLIANCE

This brief complies with the requirements of Rule 84.06. This brief contains 12,136 words (excluding the cover, signature block and this certificate) as determined by the software application for Microsoft Word.

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